gasoline to this station, the twenty year time gap between the Shell deliveries (established through Shell records) and the discovery of the spill in 2000 is too great to support the inference that Shell delivered the gasoline that spilled from the Getty station and was discovered in the soil in 2002. Therefore Shell cannot be liable for its role as a supplier of gasoline to the Getty station.

At the other site, the two spill reports from 1984 when the station was run by Chevron were related to a tank test failure, but there was no further information in Sosik's report. In 1990, however, USTs were removed at this station (then a US Oil station) along with a significant amount of contaminated soil surrounding the tanks.[185] Soil testing indicated that the contaminated soil ended about thirty feet above the water table, making groundwater contamination unlikely.[186] However, the NYSDEC file reported that some contaminated soil was left at the site.[187] Another spill was reported at this site in 1998, when it was a Coastal station, after gasoline spilled during a tank overfill and entered a storm

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185 *See* Sosik Report at 41.

186 *See id.*

187 *See id.*

drain in the street.[188] No information about an investigation was in the spill file.

A reasonable jury could find that the spills reported in 1990 and 1998 contributed to the contamination in Kayron Drive Well No. 1, along with the spill at the Getty station. The timing of the detection in the well in 2000 corresponds with the 1998 spill at the Coastal station where gasoline washed down a drain. The fact that the 1990 excavation at the same site (then a US Oil station) did not fully remove the contaminated soil beneath the ground's surface makes it likely that MTBE absorbed into groundwater when rain passed through the soil. The site is the same distance from the well as the Getty station, and groundwater flows from the site toward the Kayron Drive well. This evidence would allow a reasonable jury to find that the spills at the US Oil/Coastal station contributed to contamination in the well along with the spill at the Getty station.

4. Lakeview Avenue Well No. 1

Very low levels of MTBE were detected in the Lakeview Avenue well beginning in 2000.[189] In mid-2001, MTBE levels in the well rose slightly,

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188 *See id.*

189 *See id.* at 50.

and detections remained continuous to the present.[190]

Although multiple spills were reported in the vicinity of Lakeview Avenue Well No. 1, a good number of them were at locations downgradient from the well. As a result, Sosik eliminated those spills as possible sources of contamination even if there was confirmed groundwater contamination at the spill site.[191] The only site upgradient of the well, a Mobil station located at 5665 Sunrise Highway, reported three spills. The first reported spill, in 1996, was a minor surface spill that was very unlikely to have affected the groundwater.[192] The other two spills, reported in 1997 and 1998, were discovered during a site assessment in 1997 that revealed soil and groundwater contamination.[193] An investigation in 1998 revealed MTBE contamination in groundwater at the site at levels as high as 320,000 ppb.[194] Despite some remediation efforts, which Sosik opined were not sufficient to prevent MTBE migration, Sosik identified these two Mobil station spills as the likely cause of MTBE contamination in the Lakeview

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190 *See id.*

191 *See id.* at 51.

192 *See id.*

193 *See id.*

194 *See id.*

Avenue well.[195] Because this is the only site upgradient of the well, none of the other reported spills within the capture zone could support a finding of causation.

5. Montauk Highway Well No. 1A

Initial MTBE detections at the Montauk Highway well occurred in 1997, and later detections occurred on a more regular basis in 2000, 2005, and 2006, all at relatively low levels.[196] No less than fifteen spills at ten locations have been reported within the capture zone of Montauk Highway Well No. 1A. Sosik concluded that a spill at the Shell station located at 4076 Sunrise Highway caused the MTBE contamination in the well. The spill was reported in 2001, when a site assessment revealed MTBE and BTEX in groundwater that appeared to be migrating away from the site and toward the well.[197] Because the contamination was discovered during a site assessment, the gasoline release itself occurred some time before 2001. Sosik also concluded that releases from four other stations where gasoline constituents were found in the groundwater – a Mobil, Amoco, Sunoco, and a second Shell station – have most likely contributed to the

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195 *See id.* at 52.

196 *See id.* at 53.

197 *See id.* at 55.

contamination.[198] The spill reports from these stations all date to the early 1990's, when the Department of Transportation was preparing to widen the road. Although some remediation was initiated at the Shell, Amoco, and Mobil stations, Sosik opined that it was insufficient to prevent the migration of MTBE.[199]

The file on one spill that may have also contributed, a Gulf station, was not found and therefore there is no evidence to support a finding that this spill contributed to the contamination.[200] Testing confirmed that spills much closer to the well at a second Gulf station, a Texaco station, and an Aeroliner Marine station all had contaminated groundwater, but the stations are located downgradient from the well.[201] Therefore, no spills other than those identified by Sosik as contributors – the two Shell stations, the Sunoco station, the Amoco station and the Mobil station – could have caused MTBE contamination in the Montauk Highway well.

6. Samuel Street Well No. 4

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198 *See id.* at 56.

199 *See id.* at 55.

200 *See id.* at 55.

201 *See id.* at 54.

MTBE was detected in the Samuel Street well in 1989 and probably contaminated the well even before that time.[202] Early concentrations were quite high, and peaked at 100 ppb in late 1989.[203] After that, concentrations dropped to below 5 ppb through mid-2000, when MTBE levels began to increase again. In late 2001 and 2002, MTBE levels peaked again at 59 ppb and then 114 ppb; after that, they stabilized at levels between 13 to 45 ppb from 2002 to the present.[204]

Eleven spills at seven locations were reported within the capture zone of the Samuel Street well, but Sosik eliminated four locations from further consideration because they were cross-gradient and not close enough to the well. Another spill reported in 1998 at a CJS station was eliminated, as it apparently involved the dumping of a "yellow liquid" into a storm sewer.[205] Sosik and the NYSDEC have both identified a spill reported in 2001 at a Citgo station as a source of the MTBE contaminating the Samuel Street Well No. 4 from mid-2000 to the present.[206] The NYSDEC investigated the plume migrating away from the

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202 *See id.* at 17.

203 *See id.*

204 *See id.*

205 *See id.*

206 *See id.* at 18.

Citgo station and determined that the groundwater contamination was moving off-site toward the Samuel Street well.[207]

Plaintiffs also offer delivery records from the Island Transportation Corporation and bills of lading from Tosco Pipeline Company, purporting to show that ExxonMobil delivered gasoline to this Citgo station in 2002 and 2003, and that Gulf delivered gasoline to the Citgo station in 2001 and 2003.[208] However, these records cannot support an inference that ExxonMobil delivered gasoline to this station, because neither the Island Transportation nor the Tosco records mention ExxonMobil as a transferor or deliverer of gasoline.[209] Nor can they support an inference that Gulf delivered its gasoline to this particular station, because while the Tosco records show that Gulf loaded or purchased gasoline, they do not identify a delivery destination.[210] Because there is insufficient evidence that either Gulf or ExxonMobil delivered gasoline to the Citgo station,

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207 *See id.*

208 *See* Island Transportation Delivery Records and Tosco Pipeline Bills of Lading, Ex. J to Greenwald Decl.

209 *See id.*

210 *See id.*

they cannot be liable for their role as suppliers of gasoline to this station.[211]

In addition to the Citgo spill, a spill was reported in 1990 at a Metro station located 689 feet from the well, and another spill was reported in 1991 at a Northville station located 724 feet from the well (the location that was later occupied by the Citgo station discussed above). Both stations are upgradient from the Samuel Street well.[212] At each site, approximately ten cubic yards of contaminated soil were discovered beneath leaking USTs and removed, but no groundwater testing was performed.[213] It is unclear why NYSDEC closed the files for these spills.

Sosik did not identify these sites as sources of contamination at Samuel Street because groundwater at the sites was never tested for gasoline constituents. However, evidence shows that a significant amount of gasoline leaked into soil beneath the ground's surface, making it likely that MTBE absorbed into groundwater passing through the soil. Further, MTBE detections in

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[211] Of course, these companies may be liable for product liability and negligence claims based on their role as refiners.

[212] *See* Sosik Report at 17.

[213] *See id.* at 18.

this well date back to 1989, before the Citgo station existed.[214] The timing of both of the spill reports correlates with a 1989 detection, and these sites are located in close proximity to the well.[215] Therefore, a reasonable jury could find that in addition to the spill at the CITGO station, the spills at the Metro station and the Northville station contributed to contamination in the Samuel Street well.[216]

7. Church Street (Holbrook) Well No. 2

An isolated detection of MTBE occurred in 1991 in the Church Street well; intermittent detections occurred in 1998 and 1999; and MTBE has been detected more frequently from 2000 to the present, although at low levels.[217]

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[214] *See id.* ("the spill release would have predated Citgo's occupancy of the site").

[215] *See id.* at 18-19.

[216] Claims arising out of the 1989-2000 MTBE detections may be barred by the statute of limitations, because the very high levels of MTBE detected in this well prior to 2000 most likely triggered the statute of limitations. *See In re MTBE*, 2007 WL 1601491, at *12 n.100. This is the only well at which MTBE was detected at levels exceeding the MCL before 2000, and defendants' summary judgment motion on the basis of the statute of limitations as to this well was denied in a separate opinion. Because the point at which plaintiffs knew or should have known they were injured is a question of fact for the jury, the Metro and Northville spills that may have caused the 1989-2000 detections cannot be eliminated from the jury's consideration.

[217] *See* Sosik Report at 43.

Little dispute exists about the source of the MTBE in the well, because only one service station, a Sunoco, is located within its capture zone.[218] A significant release of gasoline at this station was reported in December 1989, and MTBE concentrations at the downgradient property line of the station were as high as 17,800 ppb in 1991. Although remediation was performed, Sosik opines that it was only partially successful, and that "[c]haracterization efforts by Sunoco's consultants over the years have conclusively demonstrated that spills which have occurred at this station have impacted the wellfield."[219] Sosik concludes that the Sunoco spill is the source of the contamination in this well.

8. College Road Well No. 2

The earliest MTBE detections at the College Road well occurred in 1993 and 1995 at low levels.[220] Beginning in 1998, detections became continuous and increased in magnitude, peaking in 2000 at about 5 ppb, and have continued to the present.[221]

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218 *See id.* at 44.

219 *Id.* at 45.

220 *See id.* at 19.

221 *See id.*

Nine spills have been reported at eight locations within Sosik's predicted capture zone for College Road Well No. 2.[222] Of these locations, an Amoco station had to be eliminated because it was located downgradient from the well, and a Mobil station was also eliminated because it was east of the groundwater divide, meaning groundwater would not flow toward the well.[223]

Groundwater contamination was confirmed in 2002 at a Shell station when a contractor installed a monitoring well as part of a site assessment and discovered "an extensive free-phase gasoline lens" on the property.[224] Groundwater contamination was also confirmed at a Sunoco station after a spill originally reported in 1990 was more thoroughly investigated in late 1991.[225]

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222 *See id.* at 20.

223 *See id.*

224 *Id.*

225 *See id.* The history of the Sunoco spill investigation is illustrative of the often arbitrary basis of NYSDEC decisions to investigate some spills thoroughly. A spill was reported in 1990 when contaminated soil was found beneath old USTs that were being removed. NYSDEC closed the spill file quickly, without performing any testing, but reopened it a year later when MTBE was reported in a private residential well about fifty feet from the station's property line. Investigations of the MTBE plume by Sunoco contractors revealed MTBE in groundwater at levels of up to 39,000 ppb in 1998, seven years later, and showed a plume migrating toward the wellfield. Without the impact to the private well, however, it is possible that no further investigation of the spill would have

Sosik identified both spills as sources of the contamination in the well.

In addition to the Sunoco and Shell spills, contaminated soil was encountered at spills reported at Centerreach Car Care in 1990, a Texaco station in 1999, and a Department of Transportation site in 1989.[226] A soil boring at the Texaco site indicated that the contaminated soil did not reach the water table, which eliminates the Texaco spill, but no similar testing was performed at the other sites. Based on the known releases of gasoline into the soil, the correlation of the dates of the spill reports with early, low-level detections in the well, and the location of these sites upgradient from the well, a reasonable jury could conclude that the spills at the Department of Transportation site and at Centerreach Car Care contributed to the contamination in College Road Well No. 2 along with the spills at the Sunoco and Shell stations.

9. Wicks Road Well No. 1

MTBE has been detected intermittently and at low levels in the Wicks Road well beginning in the Fall of 2000 and continuing to the present.[227] Ten

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occurred.

226 *See id.*

227 *See id.* at 35.

gasoline spills have been reported at six locations within the capture zone of the well.[228]

In 1999, a Mystic tanker truck overturned in the vicinity of the well, releasing nine hundred gallons of gasoline and two thousand gallons of diesel fuel into storm drains on the street, from which it discharged into a drywell and a recharge basin.[229] Later investigations at the site of the drywell revealed the presence of a migrating MTBE plume.[230] Sosik concludes that the Mystic spill is a source of the MTBE in the Wicks Road well. Plaintiffs also offer evidence showing that Texaco supplied the gasoline that was in the Mystic tanker when it spilled,[231] and on the basis of this evidence Texaco has withdrawn its motion for summary judgment as to this well.[232]

At a Northeastern gas station, a spill was reported in 1991 after a large amount of contaminated soil was encountered during a UST removal, and

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228 *See id.*

229 *See id.*

230 *See id.*

231 *See* Motiva Enterprises Bills of Lading, Ex. K to Greenwald Decl.

232 *See* Defendants' Reply in Support of Def. II ("Def Reply II") at 9. The individual defendants do not admit the truth of plaintiffs' claims but withdraw their motion as to this well to simplify the motion. *See id.*

groundwater testing indicated that MTBE was migrating away from the site.[233] Sosik concludes that the Northeastern spill is also a source of the MTBE in the Wicks Road well. Plaintiffs also offer evidence purporting to show that ExxonMobil delivered gasoline to the Northeastern station during 2001 and 2002,[234] on the basis of which ExxonMobil has withdrawn its claim for summary judgment as to this well.[235] Plaintiffs claim that delivery tickets also show that Gulf delivered gasoline to the Northeastern station on three occasions in 2001, but there is no reference to Gulf on any of the delivery tickets or bills of lading they submitted in support of this claim.[236] Therefore, ExxonMobil may be liable for damages caused by the Northeastern spill in its role as a supplier of gasoline, but Gulf may not be held liable for damages caused by this spill as a supplier.

Other spills occurred at a Mobil station and a Shell station, but Sosik provides no information about the nature of these spills other than the fact that no

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233 *See* Sosik Report at 35.

234 *See* Island Transportation Corp. Delivery Records and Bills of Lading.

235 *See* Def. Reply II at 9.

236 *See id*.

groundwater contamination was confirmed at those sites.[237] Without any further information about these spills, such as the approximate volume of gasoline released or whether they affected the subsurface, a jury could not find that they caused the well's contamination. Another spill at an Exxon station, reported in 1989, was determined by Sosik to be the "least likely to have affected the Wicks Road wellfield" because although contaminated soil was encountered, there was only one isolated detection of low levels of MTBE in a monitoring well.[238]

Evidence about one other spill, not identified as a source by Sosik, could support a conclusion that gasoline from the spill contributed to the well's contamination. A spill was reported in 1991 at a New York State Department of Transportation ("NYSDOT") site when contaminated soil was encountered during a UST removal and testing revealed very high levels of gasoline constituents in the soil.[239] Unlike the Mobil and Shell spills discussed above, the NYSDOT spill clearly affected the subsurface, and the site is located upgradient from the well. Therefore, in addition to the Mystic and Northeastern spills identified by Sosik,

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237 *See* Sosik Report at 35.

238 *Id.* at 36.

239 *See id.* at 35.

for which Texaco and ExxonMobil may share responsibility as suppliers of the spilled gasoline, a fact issue also exists with respect to the NYSDOT spill's contribution to contamination in the Wicks Road well.

10. Church Street (Bohemia) Well No. 1

MTBE was first detected in the Church Street well in the Summer of 1989 and continued through the end of the year.[240] Detections began again in mid-1995, and continued intermittently until 1999. From 1999 to the present, low-level detections have been continuous.[241] Seven spills have been reported at three different locations within the capture zone of the Church Street well. A spill reported at Ellanef Manufacturing in 1989 appeared to be related to the discovery of oil rather than gasoline in a storm drain, and was therefore eliminated from consideration.[242]

Four spills were reported at a gas station – initially a Texaco and later a Shell station – between 1990 and 1993.[243] The first spill report in 1990 was due

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240 *See id.* at 45.

241 *See id.*

242 *See id.* at 46.

243 *See id.*

to a spill of "petroleum" into the soil beneath the station during cleaning of gasoline dispenser equipment.[244] Later spill reports were related to a tank test failure. No investigations were performed as a result of these reports. Sosik did not identify spills at this site as sources of contamination because no groundwater testing was performed, but he stated that they were "suspect."[245] The tank test failures in 1992 and 1993 are evidence that gasoline was leaking out of a UST into the soil, even if the tanks were never excavated and the contaminated soil was not uncovered. Further, the dates of the spill reports in 1992 and 1993 correlate with the 1995 MTBE detections in the well. The circumstances and timing of the spills, together with the location of the site upgradient from the well, could support a jury's conclusion that the spills at the Texaco/Shell station contributed to contamination in the well.

Finally, two spills were reported at an Empire gas station, the first in 2002 and the second in 2003.[246] During cleanup of the 2002 spill, a surface release of thirty gallons of gasoline, a NYSDEC representative noticed that the

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244 *See id.*

245 *Id.*

246 *See id.*

UST leak detector alarm system was not working.[247] After further investigation in 2003, a second spill was reported upon the discovery of contaminated soil around the tanks and MTBE in groundwater.[248] Neither the station nor the NYSDEC attempted to remediate the spill or prevent MTBE migration.[249] Although the precise date of the release at this station is unknown, Sosik opines that the groundwater data from 2005 and 2006 are consistent with a spill within the five years prior to testing.[250] In his estimation, the Empire spill occurred between 2000 and 2003, and therefore could not have caused the 1989 MTBE detections in the well.[251] However, he states that MTBE has left the site and is expected to reach the well in the future.[252] Therefore a reasonable jury could conclude that the Empire spill caused more recent contamination, in addition to the Texaco/Shell spills.

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247 *See id.*

248 *See id.* Again, the NYSDEC investigation illustrates the arbitrary nature of circumstances leading to the detection of UST leaks. Had the surface spill never occurred, it is unlikely that the UST leak would have been discovered.

249 *See id.*

250 *See id.* at 47.

251 *See id.*

252 *See id.*

11. Broadway Well No. 2

MTBE has been detected intermittently in the Broadway well from early 2000 to the present.[253] Although ten spills were reported between 1990 and 1998 in the capture zone of the well, Sosik concluded that there was insufficient information to identify any spill as a source of the contamination, since no groundwater testing was performed at any of the spill sites.[254] Nonetheless, evidence indicates that certain spills are likely to have contaminated the groundwater at the spill site and could therefore have caused contamination in the well.

A former Mobil station located about six hundred feet from the well reported three spills in 1992 and 1994, all of which involved contaminated soil. Soil borings from the investigation of the 1992-reported spill revealed the presence of gasoline constituents at twenty-five to thirty-five feet below the surface.[255] In 1994, spills were reported when contractors discovered

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253 *See id.* at 32.

254 *See id.* at 32, 34.

255 *See id.* at 33.

contaminated soil beneath the surface during construction at the site.[256] Due to the proximity of the station to the well and the presence of contaminated soil at these spill sites, a reasonable jury could conclude that the Mobil station spills contributed to contamination in the well.

Other spills in the area also affected the soil beneath the surface. At a Coastal station, two spill reports were made in 1996 when a gasoline tank was overfilled, and an attendant washed the gasoline down a storm drain with water.[257] At an Advance station, contaminated soil was discovered in 1991 during a UST removal.[258] Contaminated soil was also discovered during a UST removal in 1998 at another Mobil station further away from the well, and three hundred cubic yards of contaminated soil were excavated.[259] Evidence that gasoline contaminated the soil beneath the surface or was mixed with water and washed down a drain at each of these spills makes it likely that gasoline contaminated groundwater, which flows from each site toward the well.

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256 *See id.*

257 *See id.*

258 *See id.*

259 *See id.*

In addition, in their opposition to defendants' motion for summary judgment as to the Navigation Law claims, plaintiffs offer evidence regarding gasoline contamination at a Getty station located at 734 Park Avenue. According to plaintiffs, this contamination was never reported to the NYSDEC, and Sosik does not discuss this spill in his report.[260] The evidence consists of a report by Tyree Brothers Environmental Services that was purportedly submitted to the Suffolk County Department of Health Services ("SCDHS").[261] The report describes "baydrain drywell closure activities" performed under the auspices of the SCDHS.[262] Although the report's language is technical and it is unclear exactly what type of leak, spill or dumping of gasoline occurred, the report does describe "levels of volatile organics and metals" in a drywell that "exceeded the

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[260] Sosik relied on NYSDEC spill reports to locate all known spills within each well's capture zone.

[261] *See* Summary of Underground Injection Control Baydrain Closure Activities at Getty Service Station, 734 Park Avenue Huntington, New York, December 1992 ("Summary"), Ex. C to Declaration of Steven J. German in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment on Plaintiffs' Navigation Law Claim. The report would likely be admissible as a public record describing factual findings resulting from an investigation pursuant to the agency's authority, under Federal Rule of Evidence 803(8)(C).

[262] Summary. The report mentions both the Nassau County Department of Health and the SCDHS as overseeing the project.

maximum levels set by the NYSDEC," and attempts to excavate contaminated soil.[263] This language creates a fact issue as to whether a discharge of petroleum occurred at the Getty station that led to contamination at the site. In addition, because the station is adjacent to one of the Mobil stations described above, it is likely that the groundwater also flows from this station toward the well.

Other spills in the capture zone cannot support a finding of causation because there is no indication that gasoline constituents from these spills would have entered the groundwater. Plaintiffs argue that the jury should also be able to consider as possible causes an incident in which gasoline and automotive fluids spilled onto the ground at Alive Parts in 1994, the discovery of "minimal contamination" in soil during removal of USTs at Norman's Service Station in 1990, and a tank failure that was traced to an "air pocket" at a Tartan station in 1991. Because there is no evidence of significant soil contamination beneath the surface or other means by which these spills would have been likely to have contaminated groundwater, however, the evidence about these spills is insufficient for a jury to conclude that they caused the contamination.[264] Therefore, even

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263 *Id.*

264 *Id.*

though Sosik concluded that there was insufficient information to conclude that any spills were a source of the contamination, a reasonable jury could find that spills at both Mobil stations, the Coastal station, the Getty station, and an Advance station caused the contamination in the Broadway well.

12. Crystal Brook Hollow Road Well No. 3

The Crystal Brook Hollow well began operating in 2004, and MTBE was immediately detected in its water.[265] Detections have been continuous from the initial detection to the present, with a peak in August 2004 and subsequent increases in magnitude beginning in 2006.[266]

A total of fourteen spills have been reported at eight locations within the capture zone of the well. Although Sosik concluded that there was insufficient information to determine if any of the spills were sources of MTBE in the well, evidence about certain spills creates fact issues as to causation. Five spills were reported in 1999 at a 7-11 station, which is the closest site to the well, due to monthly inventory discrepancies.[267] Although there is no evidence of soil

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265 *See id.* at 25.

266 *See id.*

267 *See id.*

contamination, inventory discrepancies support an inference that an underground leak occurred.[268] Further, the timing of multiple spill reports in 1999 is consistent with the initial detection of MTBE in the well in 2004, and the station is located in close proximity to the well. Therefore, a reasonable jury could conclude that the spills at the 7-11 station contributed to contamination in the well.

Plaintiffs also have submitted numerous delivery tickets that they claim show that ExxonMobil supplied gasoline to this 7-11 station. The Island Transportation delivery tickets state that the "transferor" of the gasoline is the Mobil Oil Corporation.[269] The tickets report deliveries made between January 2001 and December 2004.[270] Although the spills at the 7-11 station occurred prior to the period covered by these tickets, they are circumstantial evidence tending to show that Exxon/Mobil was a supplier of gasoline to the 7-11 station, and may have supplied the station in 1999. Therefore, a jury may also consider whether Exxon/Mobil is liable for contamination in the well, under the product liability and Navigation Law claims, as a supplier to the 7-11 station.

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[268] *See South Cent. Bell*, 499 So. 2d at 523.

[269] *See* Island Transportation delivery documents, Ex. C to Pl. Supp. Opp. to Def. I.

[270] *See id.*

In addition, fact issues exist regarding a spill reported at a Northville gas station in 1991, when contaminated soil was discovered beneath the ground during the removal of a gasoline tank.[271] The report indicates that although the Suffolk County Department of Health Services was not satisfied with the amount of soil removed in the excavation, the file was nonetheless closed.[272] The soil contamination, especially if not fully remedied, makes it likely that gasoline constituents were absorbed into groundwater.

Two other spills, one at a Texaco station in 2002 and one at a Getty station in 2004, were reported when trace levels of MTBE were detected in monitoring wells at each station.[273] Sosik did not believe that these detections were due to an older and more significant release, however, because no other gasoline constituents were found in the monitoring wells.[274] He opined that the

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271 *See* Sosik Report at 25-26. Another spill was reported at the Northville gas station in 1990 when contaminated soil was discovered during the removal of a diesel fuel tank. Because the diesel fuel that leaked from the tank would not have contained MTBE, the 1990 spill at this station could not have caused the contamination in the Crystal Brook Hollow well. *See id.* at 25.

272 *See id.*

273 *See id.* at 26.

274 *See id.*

trace levels of MTBE alone do not support the inference that there was enough MTBE released at the site to create a migrating plume.[275] Plaintiffs' argument that these spills should also be considered by a jury must fail as their own expert has ruled them out as possible sources of the well's contamination.

Evidence concerning the remaining spills similarly fails to support a finding of causation. A spill at a Sunoco station was eliminated because the station was not reasonably proximate to the predicted capture zone; the file on a 1987 spill at Island Transportation was destroyed, leaving no evidence for a jury to consider; and a 1997 spill at Marchese Motors involved only gasoline staining observed on the ground's surface.[276] Therefore, a reasonable jury could find that the spills reported in 1999 at the 7-11 station caused the contamination in the Crystal Brook Hollow well. The jury could also find that ExxonMobil is liable for those spills as a supplier of gasoline to that station, and that the 1991 reported spill at the Northville gas station also caused or contributed to the well's contamination.

13. Dare Road Well No. 1

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275 *See id.*

276 *See id.*

An initial MTBE detection at the Dare Road well occurred in 1997, and detections continued intermittently in 2000 through 2003.[277] From 2004 to the present, the detections have become more frequent and concentrations have increased in magnitude.[278]

Nine spill reports document known gasoline releases within the capture zone of the Dare Road well between 1986 and 1994. The information in these files, however, at least as discussed in the Sosik report, is very minimal, making an evaluation of causation difficult. One spill, at Jay-six Auto Repair, was confirmed to have contaminated groundwater at low levels, but it cannot be a source of the well contamination because groundwater from the site flows away from the well.[279] Files for the remaining spills are either missing, destroyed, or lack information. This is troubling because a number of the spills apparently involved contaminated soil discovered when USTs were removed from various sites as part of a road widening project.[280]

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277 *See id.* at 23.

278 *See id.*

279 *See id.* at 24.

280 *See id.*

Because no groundwater testing was performed at any of these sites, Sosik's report does not discuss the spills in detail and does not indicate which of the spills involved contaminated soil. Therefore, there is not enough evidence in the record about the spills in the vicinity of the Dare Road well for a jury to determine which spills caused or contributed to contamination in the well.

14. Horseblock Road Well No. 1

MTBE was first detected at the Horseblock Road in 1993, and isolated, low-level detections occurred only several times a year from 1993 to 1999.[281] In early 2000, however, the concentration spiked and detections have been continuous from 2000 to the present, although the concentration levels have dropped again.[282]

Only two spills have been reported within the capture zone of Horseblock Road Well No. 1, and the evidence does not indicate that either of the spills were likely to have contaminated groundwater. A small surface spill was reported at a Mobil station in 2000 and was apparently cleaned up that day.[283] The

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281 *See id.* at 22.

282 *See id.*

283 *See id.*

second spill was reported in 1986, at an abandoned station when storage tanks were removed and opened by a bulldozer.[284] The only evidence that gasoline had been released was a strong gasoline odor at the site.[285] There is simply not enough evidence for a reasonable jury to conclude that either of these reported spills caused the contamination in the Horseblock Road well. Based on the MTBE detections in the well, there is no doubt that some gasoline release caused the contamination, but that release remains unknown.

15. Oak Street Well No. 1

MTBE was first detected in the Oak Street well in January of 2000, and detections at low concentrations have been continuous through the present.[286] Three reported spills have occurred within the capture zone of the Oak Street well. A spill at a Getty station was reported in the Spring of 1990 when a relatively small amount of contaminated soil was discovered during the removal of a UST; about one cubic yard of soil was removed.[287] Contaminated soil was also

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284 *See id.*

285 *See id.*

286 *See id.* at 42.

287 *See id.* According to Sosik, there is no other information about this spill in the NYSDEC file. *See id.*

discovered at a Shell station during removal of a UST in 1991 and about fifteen to twenty cubic yards of contaminated soil was removed, although some contaminated soil remained after the excavation.[288] A sample of soil from seventy-five feet below the surface tested negative for gasoline constituents, although MTBE was not included in the analysis and a high threshold for other constituents was employed.[289]

Finally, an enormous gasoline release from the Northville Terminal, which is located two thousand feet from the well, was discovered in 1987. A one-eighth of an inch hole in a pipe that transported gasoline from the terminal's storage tanks to the loading racks released one million gallons of gasoline over a period of years.[290] In response to the massive spill, extensive remediation was conducted and the spill site has been carefully studied. Although studies have not indicated that the Northville spill affected the Oak Street wellfield, Sosik states that it is "highly suspect" due to its proximity to the wellfield and the absence of

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288 *See id.*

289 *See id.*

290 *See id.* at 43.

other identifiable sources.[291]

Each of these spills creates an issue of fact as to causation for the jury to resolve. The Getty and Shell spills both affected soil beneath the surface, and contaminated soil was left behind at the Shell site. The Northville spill occurred in close proximity to the Oak Street wellfield and a jury could conclude that despite remediation, some MTBE from the spill remained behind and is now contaminating the Oak Street well. Therefore, a jury may consider whether each of the known spills is a source of the contamination in this well.

16. Wheat Path Well No. 3

MTBE was first detected in the Wheat Path well in early 2000, and detections have been continuous from late 2000 to the present with a peak in September 2004.[292] Three spills have been reported at sites within the capture zone of the Wheat Path well. In 2003, a Mobil station reported minimal leaks from a gasoline dispenser.[293] This type of spill is not likely to have caused any groundwater contamination. The two other spills, both of which occurred at a

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291 *Id.*

292 *See id.* at 27.

293 *See id.*

Northville station in 1990 and 1991, are the same incidents described above for the Crystal Brook Hollow Road well. The 1990 spill was reported when contaminated soil was encountered during the removal of an underground diesel tank.[294] As discussed above, the diesel fuel that leaked from this tank would not have contained MTBE. The 1991 spill was reported upon the discovery of contaminated soil during the removal of an underground gasoline tank.[295] The Department of Health Services was not satisfied with the amount of soil removed from the site after the 1991 spill report.[296] As stated above, the contaminated soil beneath the surface at the Northville station, especially if it was not fully removed, could support an inference that MTBE dissolved into the groundwater at the spill site. Therefore, although Sosik did not opine that any of the known spills were a source of the contamination in the Wheat Path well, a jury could conclude based on the evidence that the 1991 Northville spill caused the contamination of that well.

17. Strathmore Court Well No. 1

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294 *See id.*

295 *See id.*

296 *See id.*

Isolated detections of MTBE in the Strathmore Court well occurred in early 1997 and 1998.[297] From 1999 to the present, detections were more frequent, with a peak in mid-2002.[298]

Four reported spills occurred within the predicted capture zone of the Strathmore Court well. However, the evidence as to each spill is insufficient to support a reasonable jury's verdict on causation. One of the spills, reported in 2003 at a Mobil station, involved only minimal releases from a dispenser and some staining on the ground.[299] This type of spill, of a minimal amount of gasoline on the surface of the ground, is not likely to have contaminated groundwater. There is little information in Sosik's report about the other three spills, which were reported at a Hess station in 1986, 1987, and 1999, other than the mention of intentional dumping into a storm drain in 1986.[300] The file on the 1986 spill was destroyed, however, and the evidence concerning the Hess spills is not detailed enough to support a finding of causation. Nor is there evidence of a

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297 *See id.* at 28.

298 *See id.*

299 *See id.* at 29. This is the same 2003 Mobil spill discussed above for the Wheat Path well.

300 *See id.*

leak at the one PBS tank in the area. Therefore, although MTBE has been detected in the Strathmore Court well, the source of the contamination is unknown.

18. Morris Avenue Well No. 2

From 1993 to 1998, low-level MTBE detections occurred in the Morris Avenue well about once a year.[301] Beginning in 1998, detections became more frequent with peaks in mid-1999 and 2000; detections have been continuous from 2001 to the present.[302]

Six spills were reported within the capture zone of the Morris Avenue well.[303] At only one spill, from a Getty station in 2002, was the presence of MTBE in groundwater at the station confirmed.[304] However, the spill at this Getty station is considered the source of contamination in the Kayron Drive well, and Sosik opines it is likely that well would have captured the MTBE flowing from the spill before it reached the Morris Avenue well.[305] In addition, he states that the timing of the detections in the Morris Avenue well are not consistent with transport of

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301 *See id.* at 38.

302 *See id.*

303 *See id.*

304 *See id.* at 39.

305 *See id.*

MTBE from the Getty spill.[306]

A spill reported in 2002 at an Amoco station involved the removal of four tons of contaminated soil discovered during an upgrade of a gasoline dispenser system.[307] While little contaminated soil remained after the excavation, no testing was performed to determine if gasoline constituents had entered the groundwater.[308] Because of the lack of groundwater testing, Sosik did not consider this spill as a source. However, the huge volume of impacted soil beneath the surface – as well as the fact that the dates of the leak are unknown – makes it likely that MTBE absorbed into the groundwater at the spill site prior to the removal of the contaminated soil. Therefore, a fact issue exists with respect to whether the Amoco spill contributed to the contamination in the well.[309]

In addition, the jury may consider whether gasoline from a tank overfill, which entered a storm drain at a Coastal station in 1998, and whether a

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306 *See id.*

307 *See id.*

308 *See id.*

309 A jury must also consider the dates the spill may have occurred in conjunction with the dates of detection. It may find that the Amoco spill, reported in 2002, could only have been responsible for later contributions to the contamination, which was first detected in 1993.

spill at a former US Oil/Chevron station, at the same location as the Coastal station, which involved a large amount of contaminated soil, contributed to the contamination.[310] Therefore, a reasonable jury could find that the Coastal station spill, the US Oil/Chevron spill, and the Amoco spill caused the contamination in the Morris Avenue well.

VI. CONCLUSION

For the foregoing reasons, defendants' motions are denied in part and granted in part. The Clerk of the Court is directed to close these motions (docket ## 1554, 1619, 1624, 1629, 1640, 1656).

SO ORDERED:

Dated: New York, New York
May 13, 2008

Shira A. Scheindlin
U.S.D.J.

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310 *See id.*

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